

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

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**AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE**

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2000. A scheduled hearing was canceled because no witness requested to testify. The proposed changes, other than amendments to Rule 4(a)(7) and Rule 26.1, are generally “housekeeping.”

Rule 1(b) (Rules Do Not Affect Jurisdiction), which provides that the rules “do not extend or limit the jurisdiction of the courts of appeals,” would be abrogated as obsolete. Recent legislation (Pub. L. 102-572, 102nd Congress) explicitly authorizes the Supreme Court to prescribe rules that may limit or extend jurisdiction.

Rule 4(a)(7) (Entry Defined) would be amended to address conflicting decisions of the courts of appeals regarding the time to appeal a judgment. If a district court’s order or judgment has been entered in the civil docket, but not on a separate document as required by Civil Rule 58, neither the time to bring a post-judgment motion nor the time to appeal ever begins to run. Consequently, judgments improperly entered years ago may still be open to appeal.

The proposed amendments to Rule 4(a)(7), in combination with proposed amendments to Civil Rule 58, cure this problem. First, orders disposing of certain post-judgment motions will

no longer have to be entered on a separate document under the proposed amendments to Civil Rules 54 and 58. Second, if a separate document is required under the civil rules, judgment will be deemed to be entered upon the occurrence of the earlier of the following two events: (1) when the judgment or order is entered in the civil docket and is actually set forth on a separate document; or (2) if not set forth on a separate document, when 150 days have run from entry of the judgment or order in the civil docket. The 90-day “cap” (a 60-day grace period plus 30 days to file an appeal) proposed in the original amendment published for comment was thought too short and might result in a trap for the unwary. The expanded period—150 days before the time to appeal begins to run and then 30 days to file the appeal for a total of 180 days—is believed more suitable because it coincides with the time to move to reopen the time to appeal from a judgment. The amendments to Rule 4(a)(7) would also allow an appellant—for whose benefit the separate document requirement exists—to waive the requirement and bring an appeal without waiting for a judgment or order to be set forth on a separate document. Moreover, the parties should be aware of the duty to inquire when there has been no activity for 150 days.

Under other proposed amendments to **Rule 4 (Appeal as of Right — When Taken)**, a court may extend the time to file an appeal on a showing of excusable neglect or good cause, whether or not the motion for additional time is filed before or during the 30 days provided after the original deadline to file an appeal expires. The amended rule makes clear that the provisions governing the time to appeal a decision in a civil case, and not a criminal case, apply to a writ of error *coram nobis*. The amended rule also provides that motions to correct a sentence under what is currently Criminal Rule 35(c)—and what will become Criminal Rule 35(a) if the restyling of the criminal rules is approved—does not toll the time to appeal a notice of appeal from a judgment of conviction.

The proposed amendments to **Rule 5 (Form of Papers; Number of Copies)** correct a cross-rule reference and limit petitions for permission to appeal to 20 pages.

The proposed amendments to **Rule 21(d) (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)** similarly correct a cross-rule reference and limit petitions for extraordinary relief to 30 pages. The advisory committee agreed with submitted public comments recommending that the page limit on a petition for an extraordinary writ should be increased from 20 pages to 30 pages because it closely resembles a principal brief on the merits.

Rule 24 (Proceeding in Forma Pauperis) would be amended to account for enactment of the Prison Litigation Reform Act of 1995, which requires all prisoners upon filing to pay the full amount of the filing fee or a partial amount with the remainder payable in installments, and which does not permit prisoners who have proceeded in forma pauperis in the district court “automatically” to proceed in forma pauperis on appeal.

The proposed amendments to Rules 25, 26, 36, and 45 set out procedures for providing service and notice by electronic means. They are similar to amendments to the Federal Rules of Civil Procedure that will take effect in December 2001, and they reflect an ongoing effort by the rules committees to maintain uniformity among the different sets of rules when essentially the same procedure is involved.

Rule 25(c)-(d) (Filing and Service) would be amended to permit electronic service of papers on parties who consent to such service in writing and to provide that electronic service is generally complete upon “transmittal.” **Rule 26(c) (Computing and Extending Time)** would be amended, consistent with the existing three-day “mail rule,” to provide a party with an additional three calendar days to respond to a paper served by electronic means. The three-day provision was included to encourage parties to use electronic service. Providing the additional time also

recognizes that although electronic transmission is usually instantaneous, it can be delayed because of technical problems. Under proposed amendments to **Rule 36(b) (Entry of Judgment; Notice)** and **Rule 45(c) (Clerk’s Duties)**, a clerk of court would be permitted to serve a judgment or a notice of entry of an order or judgment electronically on a party who has consented to such service by electronic means.

At the request of the Committee on Codes of Conduct, the advisory rules committees considered changes to the Appellate, Bankruptcy, Civil, and Criminal Rules requiring a nongovernmental corporate party to disclose financial interests as presently required under Appellate Rule 26.1, so that a judge can ascertain whether recusal is necessary. For the present time, the rules committees believed that a rule amendment must be sufficiently flexible to accommodate the preferences of the respective courts on an issue so personal and sensitive to judges. Accordingly, the proposed amendments—like Appellate Rule 26.1—continue to permit courts to require additional disclosure information in an individual case or by local rule.

The proposed amendment of **Rule 26.1 (Disclosure Statement)** is similar to proposed new Civil Rule 7.1 and Criminal Rule 12.4. A nongovernmental corporate party would continue to be required to disclose any parent corporation and any publicly held corporation owning at least 10 percent of its stock. If no such corporation exists, the party will now be required affirmatively to report that fact in its disclosure statement. In addition, a party will be required to supplement the disclosure statement if circumstances change.

The proposed amendments to **Rule 26(a) (Computing and Extending Time)** would eliminate the disparity in counting days for deadline purposes between the appellate rules and the civil and criminal rules. It would exclude intermediate Saturdays, Sundays, and legal holidays when computing deadlines under 11 days but count them when computing deadlines of 11 days

or more, similar to the computation methods in the civil and criminal rules. The existing appellate rule accounts for “intermediate” days only for deadlines of fewer than 7 days.

The parenthetical in **Rule 4(a)(4) (Appeal as of Right—When Taken)**, which cross references the time computation method set forth in the civil rules, is deleted as unnecessary in light of the proposed change to Rule 26. Proposed amendments to **Rule 27(a) (Motions)** would change the time to respond to a motion from 10 to 8 days and the time to reply to a response to a motion from 7 to 5 days to account for the additional time provided by including intermediate weekends and holidays in accordance with the computation changes proposed in Rule 26. The time deadline contained in **Rule 41 (Mandate: Contents; Issuance and Effective Date; Stay)** to issue a mandate would be clarified to maintain the existing 7 calendar-day deadline.

The proposed amendments to **Rule 27(d) (Motions)** and **Rule 32 (Form of Briefs, Appendices, and Other Papers)** would specify the color of covers of certain papers filed with the court.

The proposed amendments to **Rule 28(j) (Citation of Supplemental Authorities)** would limit the body of a letter containing supplemental authorities to 350 words and remove the prohibition on “argument.” The word limit was increased from 250 words originally proposed by the advisory committee to accommodate public comment expressing concern that the limit was too restrictive.

Rule 31 (Serving and Filing Briefs) would be amended to clarify that copies of briefs must be served on all parties, including unrepresented parties.

The other proposed amendments to **Rule 32 (Form of Briefs, Appendices, and Other Papers)** provide that new Form 6, in which a party certifies that a brief complies with Rule 32’s type-volume limitation, must be regarded as sufficient to meet the existing certification

requirement of Rule 32. They also provide that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it.

The proposed amendments to **Rule 44 (Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party)** require a party to give written notice to the clerk of court if it challenges the constitutionality of a state statute in a case in which the state is not a party. The amendments also require the clerk to notify the state's attorney general of the challenge.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure and new Form 6 are in Appendix A together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.